

*In the Matter of Kassiem Robinson*  
DOP Docket No. 2004-431  
OAL Docket No. CSV 6613-03  
**(Merit System Board, decided November 17, 2004)**

The appeal of Kassiem Robinson, a County Correction Officer with Burlington County, of his 12-day suspension beginning August 20, 2003, on charges, was heard by Administrative Law Judge Israel D. Dubin (ALJ), who rendered his initial decision on October 4, 2004. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on November 17, 2004, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision, but did not adopt the recommendation to reverse the suspension. Rather, the Board modified the 12-day suspension to an official written reprimand.

## **DISCUSSION**

The appellant was charged with insubordination and a violation of Section 1036(B) of the Burlington County Detention Center/Corrections & Work Release Center Policies and Procedures concerning the conduct of jail employees. Specifically, the appointing authority asserted that on May 7, 2003, while in line-up, the appellant stated, "This policy is bullshit." When corrected about his language, the appellant then stated, "This is b.s." The appointing authority contended that the appellant's conduct showed a lack of professionalism. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ's initial decision sets forth that on May 7, 2003, the appellant reported for the 7:00 a.m. to 3:30 p.m. shift line-up conducted by County Correction Lieutenant Debra Hall and County Correction Sergeants Denise Harrell and R. E. Davis. After the post assignments and other routine matters were discussed, Hall briefed the officers on a new policy concerning the rotation of bidden officers within their pods. After the conclusion of the briefing, Harrell invited the officers to speak during the question and comment period. The appellant raised his hand and was granted permission to speak. The ALJ found that in a very loud voice, the appellant declared, "This policy is bullshit." The ALJ stated that Hall and Harrell immediately interrupted and rebuked the appellant for using profanity. In response, the appellant, in a lower tone of voice, replied, "O.k., this is b.s." and presented reasons why he thought the new policy was ineffective.

Several witnesses testified at the OAL, and it was undisputed that the appellant used profanity. Hall testified that correction officers, including superior officers, frequently curse during the performance of their duties. However, she stated that what made the appellant's conduct inexcusable was the fact that he used profanity and uttered it in a loud voice while addressing a superior officer in front of 40 other officers, including new recruits. Additionally, Harrell testified that although officers are allowed freely to speak and voice their concerns during

the question and comment period, this time was still part of the line-up and an officer could not express those concerns in an unprofessional manner. However, the ALJ indicated that not a single witness testified that the appellant's comment was directed to Hall, Harrell, or the administration. The ALJ found that the comment was made in reference to the new policy and was not in any way intended to be personal. Moreover, the ALJ determined that the appellant was not insubordinate or disrespectful to his superior officers. In this regard, the ALJ stated that the appellant calmed down, lowered his voice, and said instead that "This is b.s."

Based on the forgoing, the ALJ concluded that the appointing authority did not sustain its burden of proving that the appellant was insubordinate or that he violated the policy concerning the conduct of jail employees. The ALJ recommended that the appellant's 12-day suspension be reversed. Upon its *de novo* review of the record, the Board does not agree with the ALJ's assessment that the charges were not sustained by the appointing authority. In this regard Section 1036(B) of the Burlington County Detention Center/Corrections & Work Release Center Policies and Procedures states that:

All officers and employees shall be courteous, civil and respectful to their superiors, subordinates and all other individuals they may have contact with during the discharge of their duties. An officer shall promote professionalism at all times and shall be orderly, maintain decorum, control temper, be patient and use discretion in the performance of duty.

No officer shall:

(B) Direct Insulting language or behave in a disrespectful manner while in the performance of their duty.

It is undisputed that the appellant used profanity, which directly conflicts with the policy that all officers promote professionalism at all times and maintain decorum. Additionally, it is undisputed that the appellant's superior officers interrupted him and rebuked him for using profanity. The appellant's use of profanity was insulting and showed disrespect to the appellant's superior officers given that he cursed during line-up. The appellant's continued use of unprofessional language also rose to the level of insubordination. In this regard, rather than apologizing for using profane language, the appellant replied by saying, "This is b.s." The appellant did not remedy his behavior by abbreviating his cursing. Therefore, the Board finds that the appointing authority sustained its burden of proving the appellant's insubordination and violation of policies and procedures.

Regarding the penalty, a review of the appellant's disciplinary record reveals that he received a 20-day suspension in 2002 and several minor disciplines since his employment in 1997. However, the Board finds that a 12-day suspension is unduly harsh and disproportionate to the circumstances of the situation. Although the appellant continued his use of inappropriate language, the record demonstrates that the appellant changed the tone of his voice after being rebuked and was legitimately upset with the new policy. Additionally, Hall acknowledged that correction officers, including superior officers, frequently curse during the performance of their duties. Accordingly, the foregoing circumstances provide a sufficient basis to modify the 12-day

suspension imposed by the appointing authority to an official written reprimand. *See N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d).*

Since the penalty has been reduced, the appellant is entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See James L. Smith v. Department of Personnel*, unpublished, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Board, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved.

## **ORDER**

The Board finds that the appointing authority's action in imposing a 12-day suspension was not justified. Therefore, the Board modifies the suspension to an official written reprimand. The Board further orders that the appellant be granted back pay, benefits and seniority for the 12-day suspension. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Board, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.